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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the matter of	:	
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NOTICE OF PROPOSED RULE MAKING CONCERNING PREEMPTION OF STATE AND LOCAL ZONING AND LAND USE RESTRICTIONS ON THE SITING, PLACEMENT AND CONSTRUCTION OF BROADCAST STATION TRANSMISSION FACILITIES	:	FCC 97-296 MM Docket No. 97-182

COMMENTS OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA

The Air Transport Association (ATA) is strongly opposed to the Notice of Proposed Rule Making (NPRM): Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Transmission Facilities. The ATA's members, twenty-two of whom account for greater than 95 percent of the passenger and cargo traffic carried by scheduled U.S. airlines, are principal users of the nation's airspace and have a great deal at stake in ensuring the safety of the flying public and their operations. ATA strongly opposes this NPRM on the grounds that preemption of state and local zoning laws and ordinances unnecessarily skirts a critical link in the chain of safety and sets a dangerous precedent for future circumvention.

Construction and alteration of towers and other tall structures affects not only private pilots and helicopter pilots but also the flying public and the commercial aviation industry. It could have a significant impact on airline operations, such as forcing the rerouting of aircraft.

The proposed rule allows states to thwart federal preemption of their zoning laws if they address a legitimate safety or health interest other than the environmental or health effects of radio

frequency emissions and interference with other telecommunications signals and consumer electronics devices. States have a legitimate interest in ensuring the safety of the flying public. A state's zoning laws are means of achieving air safety and should, therefore, be exempt from federal preemption.

The airline industry has typically invoked federal preemption to bypass local ordinances only when it believes those regulations hinder safe and efficient operation. Examples of such instances are clean air and noise abatement standards, and even the domestic partnership benefits ordinance in San Francisco. Public health and welfare is safeguarded and it is far easier and more efficient for a nationwide air carrier to deal with a single, national standard rather than a patchwork of state regulations.

However, zoning regulations are distinguishable. The need for uniformity is not present in this limited circumstance. Zoning regulations are unique to the area being zoned. Each state, each locality has its own distinctive topography. Local zoning officials are thus in the best position to assess how a given parcel of land should be developed.

Proponents of the proposed rule contend that the Federal Communications Commission (FCC) has the legal authority to preempt where state or local law impedes "the accomplishment and execution of the full objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 68 (1941), or where it is "necessary to achieve [its] purposes" within the scope of its delegated authority. City of New York v. FCC, 486 U.S. 57, 63 (1988); See generally Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-369 (1986).

Advocates of the proposed rule claim that "Congress explicitly indicated its objective of a speedy recovery of spectrum in Section 336(c) of the 1996 Telecommunications Act." However, the only explicit objective of §336(c) is the recovery of licenses.

47 U.S.C. §336(c) is silent as to the timetable for accomplishing this objective. It contains no provision for preemption of state or local laws. Thus, it would be tenuous for the FCC to use §336(c) as a basis for exercising federal preemption of state and local zoning ordinances.

Even if Congress did contemplate a speedy recovery of spectrum, it is evident that they did not intend preemption to be the means to that end. 47 U.S.C. §332(c)(7)(B)(ii) specifies that state and local governments shall act "within a reasonable period of time" on requests to place, construct, or modify facilities. Since that standard is arguably ambiguous, one should look to the legislative history for clarification. The legislative history of the act indicates what Congress intended by "within a reasonable period of time." The conference agreement specifically stated that when zoning variances and public hearings are required "the time period for rendering a decision will be the usual period under such circumstances." The agreement proceeds to make clear that, "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision."

Supporters of the proposed rule also assert that preemption is necessary for the FCC to achieve it's objectives within the scope of its delegated authority. Preemption of state and local zoning ordinances to accommodate accelerated DTV roll out arguably falls outside this sphere. The FCC has been given broad powers "to encourage the provision of new technologies and services to the public" (47 U.S.C. §157) and "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." (47 U.S.C. §151). Making new technology such as DTV available to the public certainly falls within the FCC's bailiwick. However, it should not be achieved at the expense of the flying public's safety.

The Federal Aviation Administration (FAA) has no specific authority to enforce obstruction standards. 14 C.F.R §77 does not empower the FAA to regulate land use in the vicinity of our nation's airports. All that is required by 14 C.F.R. §77 is notice to the FAA Administrator for any construction or alteration envisioned by §77.13(a). Similarly, 49 U.S.C. §44718 only requires that notice be given to the Secretary of Transportation when construction or alteration of a structure could adversely effect air safety.

The FAA has no power to prevent the construction of a facility it has determined is a hazard to air traffic. According to 47 C.F.R. §17.4, which covers antenna structure and registration, "If a final determination of no hazard is not submitted along with Form 854, processing of the registration may be delayed or disapproved." Section 17.4 does not say that registration will be disapproved if unaccompanied by FAA approval.

Under 14 C.F.R. §77.71(b), "In considering proposals for establishing antenna farm areas," the FAA will, "consider as far as possible the revision of aeronautical procedures and operations to accommodate antenna structures that will fulfill broadcasting requirements." This emphasis is misplaced. Promotion of air safety would best be achieved by revising broadcast requirements to accommodate aeronautical procedures and operations. Proven air safety standards should not be compromised. If anything, broadcast requirements ought to yield to ensuring the safety of the flying public, which should be our paramount concern.

These are hardly comprhensive regulations. Some structures are exempt from these reporting and notification requirements. For instance, notification is not required for construction or alteration of less than 200 feet or where the structure is shielded by another object. Such structures could pose a threat to air safety.

Federal Aviation Regulations Part 77 are inadequate for dealing with all potential air hazards. If a tower or other structure is 499 feet or less in height, it is not considered an obstacle under Part 77. In these cases, and where structures are exempt from notification requirements state and local zoning ordinances are our only line of defense against encroachment on navigable air space by tall structures.

This proposed rule is unnecessary given the flexibility available under existing law to deviate from the FCC's accelerated timetable for DTV roll-out. 47 C.F.R. §73.624(d)(3)(I) already addresses the problems that the proposed rule purports to solve. It authorizes the head of the FCC's Mass Media Bureau to grant an extension of up to six months to a licensee who, due to circumstances that are unforeseeable or beyond its control, cannot meet the construction deadline imposed by the FCC. The Bureau is authorized to grant up to two such extensions. Section 73.624(d)(3)(ii)(a) specifically mentions delays in obtaining zoning or FAA approvals as examples of circumstances warranting an extension. The need for federal preemption is obviated by the ability to secure an extension.

The ATA is very concerned about the precedent setting effect of this proposed rule. As noted in Section III, paragraph 16 of the NPRM, "petitioners have not limited their preemption rule to DTV related construction." If the DTV signal interferes with FM transmissions or other transmissions, other antennas will have to be relocated. The sheer number of antennas that will have to be built, altered or moved will strain an already overwhelmed FCC and FAA approval process. There is no way that they alone will be able to give each individual application the attention it deserves.

We thank you for the opportunity to provide these comments.

Respectfully submitted,

for: Albert H. Prest
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